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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 949

JAMES M. SINCLAIR, JR.,
Appellant

vs.

GLENN R. BAKER, ROBERT D. GRAY, JOSEPH WYATT, JR., FORD CHATTERS, and ROBERT ASH, as the State Personnel Board; JOHN F. FISHER, as the Executive Officer of the State Personnel Board; and IRVING H. PERLUSS, as Director of the Department of Employment as Real Party In Interest,
Appellees

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

PETITION FOR REHEARING

JAMES M. SINCLAIR, JR.
Appellant in Pro Se
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THE INLAND PRESS, DETROIT, MICHIGAN

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PRAYER

James M. Sinclair, Jr., the appellent, prays that this Court: grant rehearing of its order of May 18, 1964, dismissing the appeal for want of jurisdiction; order jurisdiction noted; and order summary reversal of the judgment below, and in support of the petition respectfully shows:

THIS COURT HAS JURISDICTION UNDER 28 U. S. C. 1257 (2)

Supreme Court Practice by Stern and Gressman (3rd Ed., p. 197) indicates that by the Court's use of the phrase

"want of jurisdiction" instead of some other phrase may be meant that the Court believes that no state statute was properly drawn into constitutional question, or that the state court decision did not necessarily hold the statute to be valid as against the constitutional question.

The Statute Was Drawn Into Question As Repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

California Government Code Section 19582 (b):

> "(b) If a contested case is heard by an authorized representative he shall prepare a proposed decision in such form that it may be adopted as the decision in the case. A copy of the proposed decision shall be filed by the board as a public record. The board itself may adopt the proposed decision in its entirety, or may reduce the punitive action set forth therein and adopt the balance of the proposed decision."

As recited in the opinion of the California District Court of Appeal (R. 290, also printed in the Statement as to Jurisdiction at page 5 and fully at page 15), the Appellant appealed an administrative penalty to the California State Personnel Board, where a hearing officer heard evidence and argument and presented only a proposed decision to the Board, which adopted said decision as its own, precluding a retrial of the facts in any other tribunal, without any other knowledge of the evidence or argument. Logically speaking, *either* the decision of the Board thus violated due process under *Morgan* v. *United States*, 298 U.S. 468, 481-2, *or* the actual decision was made by the hearing officer and was consistent with due process: "only the one who hears may decide" . . . but in violation of the California statutes

and constitution that only the Board had power to make a final decision!

In Appellant's judicial review of the administrative decision he presented his opponents with this dilemma, no way out, either way they turned the decision had to be reversed.

The opinion of the highest state court decided this dilemma by holding that the decision had been made by the Board *and* then dealt expressly with the general question of due process presented thereto by Appellant. It *expressly* held that the Board's practice was *expressly* authorized by the statute:

> "The express statutory authority for the procedure followed by the State Personnel Board is Government Code Section 19582 subdivision (b)." (R. 29C, J.S. 5, J.S. 20.)

and held that Appellant's contention, under *Morgan*, that due process was violated, was rejected solely in the light of a local decision concerning a similar statute (*Hohreiter v. Garrison* (1947) 81 Cal. App. 2d 384, 393). In other words, the *statute* expressly validated the constitutionally questioned procedure, so the court held the statute to be valid as against the contention that it was void as equally repugnant to the due process clause of the United States Constitution as taught by *Morgan*.

The Statute Was Properly Drawn Into Question.

The Appellant had raised the proper federal question of procedural due process, but had not expressly drawn the statute into question as repugnant to the Fourteenth Amendment. At the time it would have been *ridiculous* to do so, as the language of the statute gives no indication

that it authorizes the Board *to deny Morgan constitutional due process* (*Missouri* v. *Gehner*, 281 U.S. 313, 320). It rather seemed that the Board had erred on its own account without aid of the statute.

In determining constitutionality, legislation is always to be upheld if it can in any manner be construed so as to be consistent with the Constitution (Note Section IV of *Baggett* v. *Bullitt*, No. 220, October Term, 1963).

The court incorporated the *Fichera* decision in the judgment by its citation (R. 290; J.S. 5, 21), and did so on its own research as neither party cited the court to it and it had been decided in another district only a few weeks before this case was heard. *Fichera* said, re the challenged statute:

> "Section 19582 of the Government Code provides, in subdivision (a), that 'Hearing may be held by the board, or by any authorized representative, but the board shall render the decision which in its judgment is just and proper,' and as part of subdivision (b), 'The board itself may adopt the proposed decision in its entirety, or may reduce the punitive action set forth therein and adopt the balance of the proposed decision.'
>
> "The duties imposed upon the board, as delineated in this statute, were somewhat lessened from those earlier existent, before amendment of Section 19582 in 1953, for the statute previously had read, 'The board shall consider carefully the evidence submitted in the hearing and render a decision which in its judgment is just and proper.' (Stats. 1951, ch. 862, p. 2374.) Also, in 1953 former section 19585 was repealed. It had provided that 'Hearings may be held by the board, or any authorized representative or referee but the decision shall be rendered by the board after careful consideration of the evidence

> submitted in the hearing' (Stats. 1949, ch. 1416, p. 2471.) Thus, the requirement that the board review the evidence was eliminated." (*Fichera* v. *State Personnel Board*, 217 A.C.A. 674, 32 Cal. Rptr. 159, 162).

Clearly the court below implied to the statute, although unwritten, provision that the Board had full state-given power to decide on no evidence at all, an interpretation clearly repugnant to the Due Process Clause.

In situations of federal constitutional questions, the statute does not mean to this Court what it plainly says, but what the highest state court interprets it as saying (*Kingsley* v. *Regents*, 360 U.S. 684, 688, and cases cited there).

The California Supreme Court declined to review the judgment, leaving it as the final judgment of the highest state court in which a decision could be had, when petitioned by Appellant:

> "One of the important questions of law proposed to be settled by this Court is whether Government Code Section 19582 (b) is constitutional (R. 255). . . . Section III of the Opinion of the District Court of Appeal therefore held Government Code Section 19582 (b) to be valid as against the question raised by the Appellant that it was repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution. (R. 259-60)"

In effect, California cannot say that it was not timely apprised of the contention of the constitutional repugnancy of the statute, that it would in such event have otherwise judged the matter.

Thus the Appellant raised the federal question but the District Court of Appeal itself then drew into said question

the "new" statute to uphold the Board, necessarily holding it valid in the process. *Missouri* v. *Gehner*, 281 U.S. 313, 320, is authority for Appellant's contention that he timely assailed the statute, without mention of the many other cases on appellate surprise.

Form, ritual, and "magic words" (*Stern*, p. 65) should not prevail over substantial compliance with 28 U.S.C. 1257(2).

And, when the highest state court considers and decides on a federal question, this Court's concern with the raising of the issue disappears: *Charleston* v. *Alderson*, 324 U.S. 182, 185-186, and cases cited there.

Closing Observations.

As an aside, the *Hohreiter* case properly held this administrative rubber stamping procedure constitutional, as an aggrieved party secured his due process hearing in a trial *de novo* if he sought judicial review, but the court below erred in obstinately applying *Hohreiter* to the State Personnel Board proceedings over Appellant's showing that no *de novo* trial is permitted thereof (even as recited in Section IV of the court's own opinion).

Appellant must confess surprise that this Court found a want of jurisdiction. In fact he felt the case to be so strong, with even no opposition from Appellees, that he might see a summary reversal as in the case of *Hamilton* v. *Alabama*, No. 793, October Term, 1963 ("Who were you arrested by, *Mary?*), something like:

> "Since the statute as interpreted by the court below clearly is void as repugnant to the due process clause (*Morgan* v. *U.S.*, 298 U.S. 468, 481-2), the judgment must be reversed for proceedings not inconsistent with this opinion. *So ordered*"

It is about time for the *Morgan* case to be either reiterated or overruled, to resolve the conflict with the law in California, if not to aid in preserving freedom of speech and conscience (the issue hidden under the bringing of the charges against Appellant).

This appeal presents the other side of the coin of *Escobedo* v. *Illinois*, No. 615, October Term, 1963: "The inclination develops . . . to be satisfied with an incomplete investigation of the other sources." To put it dramatically, in this case appellant law enforcement detective was charged by his superiors with the "heresy" of making complete investigations and unconstitutionally denied a fair hearing of his defense. This Court might better seek to preserve the rights of accused individuals by encouraging officers to properly investigate *by protecting these officers against pressures (towards shortcuts) applied unconstitutionally by superior officers to the investigating officers.*

Certificate.

I, Appellant in Pro Se, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Respectfully submitted,

James M. Sinclair, Jr.

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